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THE FEDERAL ANTI-TRUST ACT OF 1890.*

COMMON CARRIERS.

Public service corporations, of which railroads will be the only topic of our discussion, are, so far as the law of restraints on trade is concerned, subject to different principles from those which obtain in the case of an ordinary merchant. Railroads are compelled by law to carry, that is, to sell their transportation for a certain price, whereas a merchant may never be compelled to sell at any given price.¹¹³ The purchaser must pay the price exacted, or go without the article, and the law only indirectly affects the price by endeavoring to promote that freedom of trade which will furnish an opportunity for the operation of the forces of competition. It is perfectly clear, therefore, that the two cases are so entirely different as to utterly exclude any common treatment by the law of restraints on trade. The Anti-Trust Act, however, unfortunately takes no account of this obvious distinction, and contains no exemption of or particular provisions as to carriers. A railroad company may be considered as a monopoly or as a member of a combination. Every railroad is a monopoly as to all transportation between non-com-

* This is the third and last of a series of articles commenced in the December (1913) issue, 62 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 73.

¹¹³ This distinction was pointed out by Shiras, J., in *U. S. v. Trans-Missouri Freight Assn.* (1893) 58 Fed. 58 at 88, 89, 1 Fed. A. T. Dec. 186 at 226, 227. Peckham, J., in *U. S. v. Trans-Missouri Freight Assn.* (1897) 166 U. S. 290 at 321, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 676.

petitive points on its line,¹¹⁴ and is a monopoly by grant from the state. Where the non-competitive points are situate in different states, the railroad is on a strict construction subject to the provisions of the act, and may be dissolved in proceedings by the United States under Section 4, a result which was probably never intended. No proceedings of this kind appear to have been taken against a single railroad, but in such a case the court could only save the railroad by adopting a liberal construction and practically flying in the teeth of the statute.

A railroad company is a seller of transportation, and when two or more competing railroads combine to fix the rates of transportation, they deprive shippers of their freedom in making purchases of transportation. Such a combination, therefore, so far as it relates to interstate transportation, is clearly within the act, whether the combination takes the form of an agreement under which the companies do business, or whether they combine under a corporate charter.

The question as to the validity of such a combination may arise in (1) proceedings by the United States under Section 4 for its dissolution; (2) proceedings under Section 7 for treble damages; (3) proceedings independently of the act. We shall take these up in the order named.

The general question as to the application of the act to carriers was raised and settled in the Joint Traffic Cases.¹¹⁵ In these cases it appeared that certain railroads formed an association, with a committee which was charged with the duty of fixing rates, and provision was made for imposing a penalty on such members of the association as refused to observe the rate thus prescribed. The association was formed with the object

¹¹⁴ This aspect of a railroad company as a monopoly has been pointed out in the cases: *Holmes, J., in Northern Securities Co. v. U. S.* (1904) 193 U. S. 197 at 406, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338 at 528. *Shiras, J., in U. S. v. Trans-Mo. Frt. Assn.* (1893) 58 Fed. 58 at 87, 1 Fed. A. T. Dec. 186 at 225.

¹¹⁵ *U. S. v. Trans-Missouri Freight Assn.* (1897) 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648, reversing 58 Fed. 58, 1 Fed. A. T. Dec. 186, which affirmed 53 Fed. 440, 1 Fed. A. T. Dec. 80, where the bill was dismissed. *U. S. v. Joint Traffic Assn.* (1898) 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259, 1 Fed. A. T. Dec. 869, reversing 89 Fed. 1020, 1 Fed. A. T. Dec. 869, which affirmed 76 Fed. 895, 1 Fed. A. T. Dec. 615, where the bill was dismissed.

of preventing rates being lowered by unrestricted competition below a reasonable rate. It appeared further that the agreement, while eliminating competition between the members of the association, did not eliminate competition between them and other railroads. There were other railroads operating in the same territory, and it did not clearly appear that the association obtained control of the market in selling transportation in the territory affected. It was held that the association violated the provisions of the Act of 1890 and an injunction was issued accordingly.

Every railroad company was, before the passage of the Anti-Trust Act, subject to a duty to carry for a reasonable rate, whatever a reasonable rate may be, and it seems clear that no railroad can escape that liability by any combination with another railroad. It seems, therefore, as if railroad companies, whether acting separately or in combination, are or may be adequately governed by the law relating to carriers. Although this position was strongly urged upon the court, it seems clear that the decision was correct because there is nothing in the Act of 1890 excluding combinations of carriers from the operation of its provisions.¹¹⁶ It would no doubt be a great advantage if carriers were excluded from the Anti-Trust Act and separately provided for.

In *Northern Securities Co. v. United States*,¹¹⁷ the controlling interests of two railroad companies were transferred to a holding company, the stockholders of the railroad company receiving the stock of the holding company in exchange. The two railroad companies were parallel, but the amount of traffic as to which there was competition between them amounted to only 3 per cent. of the whole business. On bill filed by the United States, a decree was entered forbidding the hold-

¹¹⁶ The court, however, in these cases unfortunately showed a tendency to confuse the question of a reasonable rate with a reasonable restraint on trade. One thing seems clear, however, and that is that the reasonableness of a rate is not determined solely by the forces of competition. The remarks of Shiras, J., in *U. S. v. Trans-Missouri Freight Assn.* (1893) 58 Fed. 58 at 90, 1 Fed. A. T. Dec. 186 at 229, that the reasonable rate the community is entitled to is a rate as the result of a free and unrestrained competition, may be disregarded as unsound.

¹¹⁷ (1904) 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338, affirming 120 Fed. 721, 2 Fed. A. T. Dec. 215.

ing company from exercising any rights of ownership as to the stock of the railroad companies which it held, thus indirectly compelling the re-exchange of the stock of the holding company for the stock of the railroad company. In the Supreme Court, Harlan, J., delivered the opinion, proceeding on the ground that the combination was within the Anti-Trust Law, because it was formed for the purpose of suppressing competition between the railroads, and it was not necessary to show that competition was actually suppressed, and that the device of creating the holding corporation would not suffice to prevent the application of the act.

In *United States v. Hamburg-American Line, et al.*,¹¹⁸ the complaint set out that the defendant steamship lines had entered into an agreement dividing certain traffic according to stated percentages, pooled receipts, used unfair methods and oppression in dealing with competitors, and charged excessive rates to the public and thereby acquired a virtual monopoly of the transportation business embraced in the agreement. Demurrer overruled. The court dwelt upon accompanying acts of oppression and upon effect of the combination on the market.

In *United States v. Terminal R. R. Assn.*,¹¹⁹ a bill was filed by the United States to enforce the provisions of the act against a number of defendants who had brought about a union terminal company in St. Louis. The result of the association was that no railroad company could pass through or enter St. Louis without using the facilities entirely controlled by the Terminal Company. Previous to this combination, there were three competing terminal companies. The court held, however, that a unification of terminals was frequently in the interest of good business management and was valid if fairly managed, and all railroads were given equal facilities without discrimination; but where, as in the case at bar, the management was unfair, a decree was to be entered directing a fair management upon equal terms to all and not a decree dissolving the combination. This is an entirely new application of the law and is a striking illustration of the flexi-

¹¹⁸ (1911) 4 Fed. A. T. Dec. 440, 200 Fed. Rep. 806.

¹¹⁹ (1911) 224 U. S. 383, 32 Sup. Ct. Rep. 507, 56 L. Ed. 810. See 154 Fed. 268, 3 Fed. A. T. Dec. 265, 145 Fed. 486, 3 Fed. A. T. Dec. 34.

bility of the remedy of a court of equity, and is very much the decree that many persons contend should have been entered in the Northern Securities case, that is, a decree directing the combination to be managed properly.

In *United States v. Reading Coal Co., et al.*,¹²⁰ it appeared that several competing railroads running to the anthracite coal regions in Pennsylvania, in order to prevent the construction of a competitive line, together formed a corporation (the Temple Iron Company) through which they purchased the coal mines owned by the chief promoters of the proposed railroad, and the coal from which was to furnish the principal tonnage therefor, thereby preventing the construction of the road. Held in the court below, and affirmed on appeal, that the transaction was clearly in violation of the Act of 1890.¹²¹

In *United States v. Union Pacific R. R. Co.*,¹²² it appeared that the Union Pacific Railroad had acquired by purchase 46 per cent. of the stock of the Southern Pacific Railroad, giving it control of that corporation. A bill was filed by the United States to enforce the provisions of the act against this control by the Union Pacific Railroad of the other corporation. The court below held that the companies were not in active competition except as to an infinitely small amount of business but were really partners, particularly as the Union Pacific Railroad by the stock purchase acquired the use of a line belonging to the Southern Pacific Railroad, running from Ogden to the Pacific coast, giving it a shorter outline to that region. On appeal, the Supreme Court held that there was no such partnership as found by the court below, and that the Union Pacific Railroad was acting in violation of the Act of 1890, and it was directed to divest itself of the stock control. This is the last case arising on

¹²⁰ (1912) 226 U. S. 324, 33 Sup. Ct. 90, 59 L. Ed. 90 (1910) reversing in part 183 Fed. 427, 4 Fed. A. T. Dec. 303; see *U. S. v. Lake Shore & Michigan So. Ry. Co.* (1912) 203 Fed. 295.

¹²¹ A number of other combinations appeared by the evidence, but their legality was not passed on by the court as the consideration of them was not admissible under the frame of the bill.

¹²² (1912) 226 U. S. 61, 33 Sup. Ct. Rep. 53, 57 L. Ed. 53, reversing in part 188 Fed. 102, 4 Fed. A. T. Dec. 303.

proceedings by the United States against common carriers, and it will appear that in almost every case which has reached the Supreme Court, the combination between carriers has been enjoined no matter in what form it appeared, whether a corporate control merger or agreement between the companies.

It is apprehended that in this particular the law will take a path somewhat separate from the law relating to ordinary business. This is so because the common carrier occupies such a peculiar position in the law and is under such important duties, and at the same time possesses such tremendous powers. The court has evidently felt that every combination between carriers is to be viewed with the gravest concern, and it might almost be said that there is a presumption against the legality of any such arrangement. This only leads us more strongly to the conclusion that the case of common carriers should be entirely separately provided for and not included in the same law as that relating to ordinary combinations.

Where, however, the suit is brought (1) under Section 7 against a combination of carriers or (2) between the carriers themselves endeavoring to enforce the terms of the agreement as against each other, the difficulty is that the court must determine whether the rate charged is reasonable or unreasonable and what is a reasonable rate; the Anti-Trust Act contains no provision on this subject; another reason why carriers should not have been included in the act and should be separately provided for.¹²³ It seems, therefore, that in a proceeding by a shipper to enjoin a combination of railroads from charging unreasonable rates, a prayer for an injunction against the combination as in illegal restraint of trade, will be improper.¹²⁴ The question of whether a rate is reasonable or not is therefore not properly to be determined under the provisions of the Act of 1890. No case has arisen of a suit between carriers, members of a combination, to enforce the terms of the combination against each other.

However, an action may be brought under Section 7 against

¹²³ United States cannot maintain a bill in equity under Act of 1890 to prevent granting of rebates. *U. S. v. Atchison, T. & S. F. Ry. Co.* (1905) 142 Fed. 176, 2 Fed. A. T. Dec. 831.

¹²⁴ *Tift v. Southern Ry. Co.* (1905) 138 Fed. 753 at 760, 2 Fed. A. T. Dec. 733 at 744.

a combination of carriers. In such a case, where the unjust or unreasonable rate has been fixed as one of the constituent acts in carrying out a combination unlawful under the act, the party who has been prevented by the unreasonable rate from shipping at all may sue the railroad company as one of the members of the combination, notwithstanding the unreasonableness of the rate has not been passed on by the Interstate Commerce Commission. The fact that the question as to the unreasonableness of the rate may be determined in two ways is immaterial.¹²⁵

Several cases have arisen of suits between parties and carriers independently of the act. They are as follows:

In *Steele v. United Fruit Co.*,¹²⁶ a bill by a stockholder of a steamship company against a corporation and officers of the steamship company, which corporation had acquired a controlling interest in the steamship line and used it (1) to suppress competition between itself and the steamship line, (2) violating neutrality laws, (3) fraudulent mismanagement for the benefit of the United Fruit Company. Bill was sustained, it being held that the acquisition was for the purpose of eliminating competition. No discussion of injury to stockholder. This case decides that mere purchase of a controlling stock interest in a corporation by a competitor is a violation of the act.

In *Delaware, Lackawanna & Western R. R. Co. v. Kutter*,¹²⁷ it was held that a contract whereby a railroad company made an individual an exclusive agent for a term of years to build up a milk business, was valid and enforceable between the parties, notwithstanding the Act of 1890.

In *Delaware, Lackawanna & Western R. R. Co. v. Franks*,¹²⁸ the plaintiff railroad company was denied equitable relief because it was a member of an illegal combination.

In *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.*,¹²⁹

¹²⁵ *Meeker v. Lehigh Valley R. R. Co.* (1910) 183 Fed. 548, 3 Fed. A. T. Dec. 969, reversing 162 Fed. 354, 3 Fed. A. T. Dec. 380; see also 175 Fed. 320. Plaintiff's damages were loss of business and loss of profits on business transacted.

¹²⁶ (1911) 190 Fed. 631, 4 Fed. A. T. Dec. 386.

¹²⁷ (1906) 147 Fed. 51, 2 Fed. A. T. Dec. 1021.

¹²⁸ (1901) 110 Fed. 689, 2 Fed. A. T. Dec. 81.

¹²⁹ (1896) 73 Fed. 438, 1 Fed. A. T. Dec. 604.

an action was brought by a railroad against another railroad company and others for damages caused by refusing to accept freight from the plaintiff company on through bills when such freight was accepted and carried on through bills on contract with other railroad companies, which other contracts were exclusive of the plaintiff. It was held there could be no recovery, that the contract between the railroad companies as to exchange of passengers and freight was valid at common law, and not void under either the Act of 1890 or the Interstate Commerce Act.¹³⁰

The case of discrimination by a carrier stands on a somewhat different footing. Trade may be restrained in so far as the discrimination operates to the disadvantage of any shipper or particular number of shippers and the total volume of trade may be increased by the discrimination in question. The competitor is generally the one who is benefited to the disadvantage of the party he competes against. From the shipper's point of view, the discrimination, in so far as it can be ascribed to the act of the competitor, is very close to the line of unfair competition, and, if it could be considered as such, is subject to the provisions of the act. So far as the carrier is concerned, it is an evasion of its common law liability to carry for all equally, and the injury to the shipper does not seem in any sense to come within the provisions of the act, and it has accordingly been so decided.¹³¹

Railroads may also restrain trade in another way. An extortionate rate charged by a carrier is a restraint operating on both parties to a shipment, and is analogous to the restraint caused by bad roads or lack of transportation altogether. The difference is only in degree. It is doubtful whether this kind of

¹³⁰ Confer, *Gulf C. & S. F. Ry. Co., et al., v. Miami S. S. Co.* (1898) 86 Fed. 407, 1 Fed. A. T. Dec. 823.

¹³¹ See *American Union Coal Co. v. Penna. R. R. Co.* (1908) 159 Fed. 278, 3 Fed. A. T. Dec. 312, where the plaintiff in one count stated a cause of action under the interstate commerce act for discrimination, and also alleged a combination on the part of the defendant with certain other railroad companies to restrain trade, and claiming as damages the difference in charge per ton as paid by the plaintiff and as paid by its competitors, and claiming treble damages under §7. The court held that the claim for treble damages must be thrown out, that is to say, a suit for damages for acts condemned by the commerce act cannot be brought within the provisions of the Anti-Trust Act.

restraint was within the cognizance of the common law, and the attention of the community has only been directed to it in recent years when transportation has been highly developed and become more necessary to the business life of the community.¹³²

A strike of the employees of a railroad company is a restraint of trade in so far as it prevents the operation of the railroad and thereby restrains the trade of all persons shipping over the line. This restraint, however, is directly brought about by the action of the employees, and has already been noticed under the discussion of labor unions.¹³³

ATTEMPT.

No case has arisen involving any decision as to the application of the provisions of the act to an attempt. An attempt is condemned only in the second section, and the only attempt mentioned is an attempt to monopolize. It seems clear, therefore, that under the wording of the act, an attempt to monopolize falls within the prohibition of its terms. Every attempt to monopolize must involve (1) a contract, (2) a combination, (3) a conspiracy in restraint of trade, (4) an individual effort. If a liberal

¹³² This aspect of a restraint by a combination very frequently appears in the reasoning of the judges. Shiras, J., dissenting in *U. S. v. Trans-Mo. Frg. Assn.* (1893) 58 Fed. 58 at 87, 88, 1 Fed. A. T. Dec. 186 at 225. It is, however, a very different restraint from that produced by a combination of carriers and the two should not be confused. Hough, J., in *Thomson v. Union Castle Mail S. S. Co.* 149 Fed. 933 at 935, 3 Fed. A. T. Dec. 108 at 111, referred to another aspect of a restraint on trade produced by a carrier. He said that if a new line of foreign transportation should be organized in London to connect a United States port with a foreign port, and that line charged unreasonable rates, it could not be said to be restraining trade or commerce which it creates and which before did not exist. It, however, does not create the commerce; the commerce consists of the buying and selling, and the line of ships furnishes transportation through which the commerce may flow. The buyers and sellers were there before, but were either not buying and selling with each other or through another avenue of transportation. The extortionate rate, therefore, does restrain commerce and the fact that the line of transportation is a pioneer in that territory does not permit it to charge an undue rate any more than if there were competitors or if it had been operating some time.

¹³³ The distinction between the carrier as a transporter of the goods sold and the sale itself between the parties in different states was overlooked by Platt, J., in *Loewe v. Lawler* (1906), 148 Fed. 924 at 925, 3 Fed. A. T. Dec. 41 at 43, where he said: "The real question is whether a combination which undertakes to interfere simultaneously with both actions (the manufacture and sale) is one which directly affects the transportation of the hats from the place of manufacture to the place of sale." This misconception was the chief cause of the error in the decision of the court below in this case.

construction of the act be adopted, an attempt will never become the subject of proceedings by the United States under Section 4 because under such construction the act only applies to restraints actually affecting the market to an undue extent, and these can only occur, as we have seen, from the operation of a contract, combination or conspiracy in restraint of trade, individual effort being valid. Therefore, no attempt to achieve a monopoly is cognizable in civil proceedings unless it amounts to the completed act described and condemned in Section 1. Its character as an attempt will be merged in the completed act. How far an attempt is the subject of criminal proceedings is a question which lies outside the scope of this discussion.

COMPETITION AND THE ACT.

We have seen that a restraint of trade may or may not result in a restriction of competition, and that competition is restrained only, if at all, as a result of the restraint of trade, and to speak, therefore, of a restriction on competition is to put the effect before the cause and that too an effect which does not always follow from the cause. It has been frequently said that the object of the act was to promote competition.¹³⁴ On the other hand, it has been said that the act says nothing about competition and does not have that in view.¹³⁵ It appears, therefore, that there is a difference of opinion on this point, which probably springs from a failure to recognize the distinction between restraints on trade and restraints on competition. The removal of restraints on trade may furnish an opportunity for competition, but competition may not ensue. You cannot make a merchant or a corporation compete if they do not want to, any more than

¹³⁴ Thompson, D. J., in *U. S. v. Chesapeake, &c. Fuel Co.* (1900) 105 Fed. 93 at 103, 2 Fed. A. T. Dec. 34 at 48. Harlan, J., in *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197 at 337, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338 at 467. Buffington, J., in *U. S. v. Reading Co.* (1910) 183 Fed. 427 at 460, 3 Fed. A. T. Dec. 866 at 913, *et seq.*

¹³⁵ Holmes, J., in *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197 at 403, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338 at 525, said: "The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition."

you can make the proverbial horse drink when you lead him to water.¹³⁶

Competition is probably determined by economic laws, over which Congress fortunately has no control. Furthermore, as we have seen, competition among the sellers is a great advantage to the buyers, as is competition among the buyers a great advantage to the sellers; and competition among the sellers is disadvantageous to the sellers, as competition among the buyers is disadvantageous to the buyers. When, therefore, we speak of restricting competition, in order to accurately apply our remarks to the situation, we must distinguish which side of the market we are talking about, *i. e.*, whether we are talking from the point of view of the buyers or sellers. In so far, however, as any of the acts forbidden by the statute, as monopolizing, etc., restrain competition, the act does in effect operate on competition. The phrase "every attempt to monopolize" embraces every act of competition, fair or unfair. The difficulty is that no light is shed on the question of which competition is affected, competition among the buyers or competition among the sellers. Excessive competition of the buyers can never injure the sellers, but excessive competition among the sellers will injure the sellers, just as excessive competition among the buyers in the case put will injure them and not the sellers. The conflict of interest as to competition has been overlooked by these learned commentators, who seem to feel that competition should be encouraged, no matter what competition or from whose point of view. The act says nothing about competition but merely refers to certain acts of trade and declares them to be unlawful without, however, defining them.

¹³⁶ Holmes, J., in *Swift & Co. v. U. S.* (1905) 196 U. S. 375 at 400, 25 Sup. Ct. Rep. 276, 49 L. Ed. 518, 2 Fed. A. T. Dec. 641 at 666. When a given restraint on trade has been abolished (such, for instance, as the dissolution of the Standard Oil Company, assuming that it was in point of fact a restraint on trade which should have been dissolved) the government and the people sit back and expect competition to be resumed, and wonder why it does not begin. If it does not happen to suit the component parts of the Standard Oil Company to compete, they cannot be compelled to do so. It is one thing to dissolve restraints on the freedom of an individual trader; it is another thing to by law compel him to compete. It is one thing to prevent an immense aggregation of capital from pursuing unfair methods of competition; it is another thing to break up that aggregation and compel the component parts to compete.

RESTRAINT BY MANUFACTURER ON PRICE OF RESALE.

It frequently happens that a manufacturer sells his product throughout the United States, and in order to reach the consumer is forced to avail himself of the services of jobbers and retailers, and in many such cases it is a great business advantage to the manufacturer if his product is always sold in every place at the same retail price. No one can successfully question the right of the manufacturer to fix his own price to the consumer in the case of a sale at the door of the factory. Is that right any the less because of the intervention of other parties between the manufacturer and the consumer? The manufacturer has generally sought to accomplish his end by some sort of contractual arrangement with the jobbers or retailers by which the latter agree to sell again only at the price and in the manner determined by the manufacturer. Under this method each retailer has the same profit, and any particular shopkeeper is prevented from cutting the price on that commodity as an advertisement, and thus injuring the sale of it in other shops where the retail price fixed is observed. The question as to the validity of these contracts has generally come up where the arrangement has been made by owners of patents or manufacturers of proprietary patent medicines. In a number of cases, most of them before the lower Federal courts, different conclusions have been reached.¹³⁷ In

¹³⁷ In *Board of Trade v. Christie* (1905) 198 U. S. 236, 25 Sup. Ct. Rep. 637, 49 L. Ed. 1031, 2 Fed. A. T. Dec. 717, reversing 125 Fed. 161, which reversed 121 Fed. 608, which reversed 116 Fed. 944, 2 Fed. A. T. Dec. 233, it appeared that the Chicago Board of Trade maintained an exchange hall for the exclusive use of its members, collected quotations on the board, and sold the quotations to the telegraph companies under certain restrictions as to the persons to whom the quotations are to be furnished by the companies. Certain individuals obtained these quotations in a manner not provided for by the restrictions, and were distributing them contrary to the regulations adopted by the Board of Trade and to persons not authorized in those regulations to receive them. The Board of Trade, it was held, was entitled to an injunction preventing such distribution. Holmes, J., stated the facts and said that even if the sales on the Board of Trade were illegal because gambling transactions, it being contended by the defendants that the sales were illegal and contrary to public policy, that the board was entitled to protection as he said that "the statistics of crime are property to the same extent as any other statistics, even if furnished by a criminal who furnishes some of the data." This was not a parallel case, although not so observed by the learned judge, because here the Board of Trade would have been deprived of its usefulness if the statistics could not be furnished, and the furnishing of the statistics was part of and entered into the unlawfulness

one case in the Supreme Court of the United States¹³⁸ it was decided that the owner of a proprietary patent medicine was not entitled to have an injunction restraining a third party from selling at less than the fixed price the patent medicine which he had obtained from a middleman in violation of the contract. There was, however, a strong dissent, and it is apprehended that some of the principles involved have been overlooked.¹³⁹

The middlemen do not, in a proper economic sense, enter into the transaction as purchasers of the article. They are in an

of the act, if any, whereas, in the case put the statistics existed independently of and unconnected with the act of furnishing them. The only restraint on trade, if there was one, was on the purchase of the information. The party who had it for sale and controlled the source refused to part with it except on certain terms, and only the persons complying with those terms could obtain the data. The case is similar to that of a natural monopoly or a manufacturer who is entitled to sell his manufactured product at any price or on any terms he may see fit. Injunction refused the manufacturer against a third party who was buying medicine from persons who were parties to the contract and re-selling without regard to the price fixed. *John D. Park & Sons v. Hartman* (1907) 153 Fed. 24, 3 Fed. A. T. Dec. 229, reversing 145 Fed. 358, 2 Fed. A. T. Dec. 999. Confer, *U. S. v. Greenhut* (1892), 50 Fed. 469, 1 Fed. A. T. Dec. 30, 51 Fed. 205, 1 Fed. A. T. Dec. 33 (1892) 51 Fed. 213, 1 Fed. A. T. Dec. 46. Injunction awarded the manufacturer against third party who obtained the goods, mutilated the labels and sold at cut prices. *Dr. Miles Medical Co. v. Jaynes Drug Co.* (1907) 149 Fed. 838, 3 Fed. A. T. Dec. 103. In *Phillips v. Iola Portland Cement Co.* (1903) 125 Fed. 593, 2 Fed. A. T. Dec. 284, a contract by a manufacturer in Kansas with a jobber in Texas, by which the jobber agreed not to re-sell out of the State of Texas, was held valid on the questionable ground that it did not restrain interstate commerce. In *Bobbs Merrill Co. v. Straus* (1905) 139 Fed. 155, 2 Fed. A. T. Dec. 755, a number (90%) of the publishers entered into an agreement not to sell to a dealer in books who should sell their books to the public below the net price which might be fixed by the publishers in each case, and a number of booksellers, amounting to 90% of those in the United States, entered into an agreement to co-operate with the purpose of the publishers' association. A publisher filed a bill for an injunction to restrain the defendant from selling a certain copyrighted book below the publisher's fixed net price. Defendant was not a member of either association. No injunction was awarded, the combination being held illegal as in restraint of trade under the Anti-Trust Law. The defendant had been black-listed as a price-cutter and was unable to obtain any books. Notice did not put the defendant under any contractual duty, and the plaintiffs were merely trying to enforce the terms of the unlawful agreement against the defendant only. Since no contract liability, plaintiff could not enforce. Anyhow case does not touch the point. No infringement of the copyright laws.

¹³⁸ *Dr. Miles Medical Co. v. J. D. Park & Sons* (1911), 220 U. S. 373, 31 Sup. Ct. Rep. 376, 55 L. Ed. 502, 4 Fed. A. T. Dec. 1, affirming 164 Fed. 803, 3 Fed. A. T. Dec. 470.

¹³⁹ See, however, article "Price Restrictions on the Re-Sale of Chattels," by William J. Shroder (1911), 25 HARV. LAW REV. 59, in which the author concludes that apart from the Anti-trust law, such restrictions are void at common law, in the case of chattels generally, and in the case of manufacturing articles by secret process, and that to sustain the validity of such restraints of fixing prices, would render nugatory the efforts of a quarter of a century to enforce the public policy declared in the Anti-trust statutes.

entirely different class from the consumer, and the law has no tender regard for them. The deduction from this, however, is not that an arrangement must be made by which the middlemen are deprived of profit, but that freedom of trade among middlemen is not necessary, and therefore restrictions on that freedom of trade are not contrary to the common law.¹⁴⁰ In the case, however, of a combination of manufacturers, the circumstances are different. If they are strong enough to control the market, they may restrain the freedom of the purchaser in buying as effectually by such agreement as by any other arrangement among themselves.¹⁴¹

It was assumed by the Supreme Court of the United States in the case referred to that the case of the owner of a proprietary medicine, a patent or commodity manufactured by a secret process, standing, therefore, somewhat in the position of a monopolist, is in a better position than an ordinary manufacturer. In the first place, it is erroneous to argue for a greater right in such a case on the part of the owner of a patent than in the case of an ordinary manufacturer, because the patentee, having a monopoly granted by law and akin, therefore, to the case of a natural monopoly, may well suffer a more stringent regulation as to his exercise of that monopoly than a private manufacturer who produces a commodity solely by his own business skill and manufacturing experience. The Act of 1890, therefore, should be amended so as to distinguish as to the right of restriction on resale between the cases of (1) the patentee, (2) the individual manufacturer, (3) a combination of manufacturers, and here an additional distinction should be drawn between a combination strong enough to control the market, and one which has not such strength.

The distinction to be observed is between the case of an individual and the case of a combination. It is extremely advan-

¹⁴⁰ See remarks of Lurton, J., in *J. D. Park & Sons v. Hartman* (1907), 153 Fed. 24 at 44, 3 Fed. A. T. Dec. 229 at 259.

¹⁴¹ This case must be distinguished from that of a trader who does not produce the article he buys in the market with an eye to future sale at a profit. No restrictions imposed on him by his vendor or by him on his vendee will be valid. This is obviously a different case.

tageous to the manufacturer to have a uniform retail price. It is likewise to the advantage of the consumer, and competition is not interfered with because the manufacturer must compete with other manufacturers throughout the country who are doing the same thing as himself. An individual manufacturer cannot fix any price by means of an agreement of re-sale that he cannot maintain against competitors at his door. The competition beneficial to the consumer, and which he requires, is not competition among middlemen as to obtaining a product from the same manufacturer, but a competition among other consumers, and perhaps among middlemen as to obtaining products from different manufacturers.

We have specially discussed proceedings by the United States under Section 4 relating to labor unions, monopolies, patents and common carriers, all of which seem to depend on special principles. There still remain for consideration combinations relating to buying and selling of commodities in general. The legality of such a combination may be involved either in proceedings by the United States under Section 4 for its dissolution or under proceedings between the members of the combination to enforce its provisions as between themselves.¹⁴²

We have already referred to cases between private parties involving the validity of a contract or a combination in restraint of trade but chiefly for the purpose of pointing out the remedy of the parties, and we shall now consider them together with the validity of an ordinary combination in restraint of trade in proceedings (1) by the United States (2) between the parties

¹⁴² We have already noticed that a combination or a member thereof may proceed against a third party notwithstanding the invalidity of the combination, and we have already noted the omission of the discussion of criminal proceedings under the act. Where the proceedings are under §4, the combination must affect interstate buying or selling. Where the proceeding is between individual members of a combination, no question of interstate commerce need be involved if other grounds of Federal jurisdiction, such as diverse citizenship, appear. Of course the act only provides for three distinct remedies, and the conclusion that the invalidity of a combination may be set up in a suit between the parties is merely a deduction from the provisions of the act making such an act unlawful, and seems to be well settled notwithstanding the dissenting opinion of Mr. Justice Brewer. See note 26, *ante*.

There is no reason to think that there is any distinction in the test to be applied in these two cases, at least none has been suggested in any reported decision.

If we adopt a literal construction of the act, every combination affecting interstate commerce, no matter how small an extent is void. But as the Supreme Court of the United States has not placed such construction on the act, we may dismiss this view without further consideration. But suppose a liberal construction is adopted. The question then is, what is the test of the validity of a combination under the act. Does the combination restrain the freedom of interstate buying or selling? If it does, does it do so to an extent condemned by the law? This raises a further question what restraint on the freedom of the buying and selling is condemned by the law? To this question no exact answer can be given in the present state of the authorities, and it is not likely that the question ever will be answered so long as we retain the spirit of the common law. The law can no more hamper itself by a definition on this point than it can by a definition of fraud; both are questions of fact to be determined, it is true, in the light of certain well-settled principles, but principles which will receive a different application in every particular case. The eminent statesmen who undertake to solve this problem of what is an unlawful restraint of trade by legislation will probably find that they have attempted the impossible and only add another to the many legislative wrecks with which our history is strewn. It has frequently been suggested at common law that combinations affecting necessities of life stand on a footing by themselves, and are to be judged by a stricter rule than is to be applied to combinations affecting commodities, which cannot be classified as necessities of life: in this respect occupying perhaps a position between the case of a public service corporation and an ordinary merchant. If we adopt a liberal construction of the statute, there is room for such a distinction in applying its provisions. This distinction was drawn in *Dueber Watch Case Mfg. Co. v. E. Howard Watch and Clock*

Co.,¹⁴³ but no other case has been found in which it has been referred to.

The distinction between a combination and a monopoly should again be pointed out. A monopoly may exist without a combination, and a combination may be carried on without producing a monopoly. A monopoly may be the result of a combination, so far as any connection between the two is material. A combination may, however, achieve such a control over the market as to restrain the freedom of buying and selling to such an extent as to produce the evils of a monopoly.

Let us examine into this question of the control of the market. Suppose there are one hundred persons engaged in selling a certain commodity and they are all in competition with each other. If one is removed, it is clear, of course, that to this extent competition is diminished and the freedom of the purchaser in buying is correspondingly restrained. Removal of one competitor, however, would obviously produce such a slight restraint that the law could take no account of it. Suppose, however, ninety-nine competitors were removed and one was left. Here all competition would be eliminated and the freedom of the purchaser in buying would be correspondingly restrained, and the law might well take account of the situation. Where, however, between the two cases of ninety-nine and one is the law to draw the line? No satisfactory answer to this question can be made.

It is further to be remarked that if all the competitors are removed by the successful effort of one competitor in driving the others out, the law does not condemn him for what he has done, and the purchasers must put up with the restraint thus imposed on the freedom of their buying so long as he is able to maintain his position. So also if competitors are removed by death or bankruptcy, the law takes no account. In like manner, in modern times, if they are removed by purchase on the part of an individual competitor, there is no concern of the law. Where, however, a number of competitors, such as five or ten, com-

¹⁴³ (1895) 66 Fed. 637, 1 Fed. A. T. Dec. 421, affirming 55 Fed. 851, 1 Fed. A. T. Dec. 178, where demurrer to complaint was sustained. See remarks of Shiras, J., in *U. S. v. Trans.-Mo. Fgt. Assn.* (1893) 58 Fed. 86 at 88, 1 Fed. A. T. Dec. 186 at 226.

bine and then as a combination proceed to buy up the remainder of the competitors, the law does say that they have over-stepped the limits of freedom in trade.

SIZE OF THE BUSINESS.

It has been suggested that the size of the business may be a determining factor, but this suggestion raises the same difficulty, what size business is unlawful? It has been said that it is not a monopoly in the legal sense of the term for a corporation to sell the whole or a large part of products in a certain line; that the act does not condemn the ownership but the monopoly therein, all other persons being free to engage in the same business.¹⁴⁴ We have collected in the note a few cases where the size of the business, indicated with reference to the whole market has been referred to as a determining factor in condemning the combination.¹⁴⁵

TRIFLING RESTRAINTS.

It has often been said that the act does not apply to trifling restraints. It is, of course, a question of fact whether in any given case the restraint is trifling, and, as may be expected, no

¹⁴⁴ Jackson, J., *In re Greene* (1892), 52 Fed. 104 at 115, 1 Fed. A. T. Dec. 54 at 71. See article "Is a Large Corporation an Illegal Combination or Monopoly under the Sherman Anti-Trust Act," by George F. Canfield, 9 COL. LAW REV. 95, where the author concludes that it is not, on the ground that a large corporation was not illegal at common law, and the prevailing idea of its illegality is due to failure (a) to recognize that no principle of the common law condemns mere growth in size, (b) to distinguish between contract rights and property rights, the denomination of trade by contract only being obnoxious to the common law; that the Act of 1890 was passed in view of these principles, and it cannot be extended to condemn a corporation merely because of its size. The act does not reach such a corporation until it has entered into an agreement in restraint of trade or some illegal act pursuant thereto. The article, it is to be noted, was published before the decision of the Supreme Court in the Standard Oil and Tobacco cases had been handed down.

¹⁴⁵ 75%—*Wheeler-Stenzel Co. v. Nat'l Window Glass Assn.* (1907) 152 Fed. 864, 3 Fed. A. T. Dec. 208; 70%—*Nat'l Harrow Co. v. Hench* (1897), 83 Fed. 36, 1 Fed. A. T. Dec. 742; 98%—*Continental Wall Paper Co. v. Voight & Sons Co.* (1909) 212 U. S. 227, 29 Sup. Ct. Rep. 280, 53 L. Ed. 486, 3 Fed. A. T. Dec. 480, affirming (1906) 148 Fed. 939, 3 Fed. A. T. Dec. 44, s. c. 78 C. C. 567, 204 U. S. 673. In *Standard Oil Co. v. U. S.* (1911) 221 U. S. 1, 31 Sup. Ct. Rep. 502, 55 L. Ed. 619, 4 Fed. A. T. Dec. 79, affirming and modifying 173 Fed. 177, 3 Fed. A. T. Dec. 696, and in *U. S. v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. Rep. 632, 55 L. Ed. 663, 4

hard and fast line can be drawn and decisions will vary according to the individual views of the judges deciding them. A few cases have been collected in the note.¹⁴⁶

Two views are possible: is a restraint trifling with respect to the body or volume of the particular trade as to which the restraint exists, or is it merely trifling with respect to the volume and extent of interstate trade as a whole? This question of fact is probably an approach from the other side of the same inquiry as to control of the market. If the restraint does not result in giving the combination a control of the buying and selling, it is trifling.

The determination of what amounts to a control of the market is the same problem, from another point of view, as the question of what is an undue restraint on the freedom of buying and selling, and is purely an issue of fact. A great many of the earlier cases under the act arose on demurrer, the question being whether the unlawful agreement was sufficiently alleged. These cases are of no value or very little value in the inquiry we now have in hand. A few of the cases turning on questions of fact will now be referred to. Before considering them, however, it will be necessary to discuss the bearing of intent in considering the application of the provisions of the act to combinations in restraint of trade.

INTENT.

At common law, motive or intent in entering into or performing a contract is ordinarily immaterial, and where material is generally so in determining the legality or illegality of the con-

Fed. A. T. Dec. 168, reversing 164 Fed. 700, 3 Fed. A. T. Dec. 427, the court was influenced very largely by the size of the defendant combinations in deciding that they were unlawful.

¹⁴⁶ The fact that trade in the particular commodity restrained amounted to only 1% of the whole trade of dealers in that line, immaterial, *Montague & Co. v. Lowry* (1904), 193 U. S. 38, 24 Sup. Ct. Rep. 307, 48 L. Ed. 608, 2 Fed. A. T. Dec. 327. The fact that only 3% of the business of the competing railroads was the subject of competition between them and restrained, was held immaterial, *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338. Control of one-ninth of the product of copper in the United States not sufficient to indicate a monopoly, *Bigelow v. Calumet & Heckla Mining Co., et al.* (1909), 167 Fed. 721, 3 Fed. A. T. Dec. 618, affirming 167 Fed. 704, 3 Fed. A. T. Dec. 593, which reversed 155 Fed. 809, 3 Fed. A. T. Dec. 293.

tract. So far as covenants in restraint of trade are concerned, no clear statement can be found in the books of the bearing of the intention of the parties.

The common law rule was probably this: where the restraint is only on the trade of the covenantor, and the covenantee is by taking such a covenant acquiring control of the market, the question of intent or guilty knowledge on the part of the covenantor seems to be material in determining his status under the contract when he is a plaintiff. He cannot recover if he is a participant in the unlawful design of the covenantee. If he is innocent he can recover.¹⁴⁷ If, however, the covenantee is plaintiff, the covenantor can set up the illegality of the covenant in defence in all cases, the intent of the covenantee being immaterial. Sometimes, where it is not clear on the facts whether the covenant is unlawful, the intent of the covenantee is referred to as a material ingredient. So in the case of a combination where all parties covenant in restraint of trade, they are all equally guilty, and in a suit between them any one of them may set up in defence the illegality of the covenant as in restraint of trade, and the presence of an intent to control the market is only material in a close case on the facts. Where the combination clearly produces an unlawful restraint on its face or in connection with the surrounding circumstances, a defendant will set up his innocence in vain.

In all these cases arising at common law, we must remember that the parties whose trade was restrained by the performance of a covenant or the carrying out of the terms of a combination in restraint of trade were without remedy, and the common law only indirectly relieved them by refusing to enforce the terms of such a covenant or combination as amongst the members. When, however, we examine the remedy conferred by Section 4 on the United States, a somewhat different question is raised. This remedy, if we adopt a liberal construction of the statute, is confined to those cases where at common law, in a suit between the parties, the covenant or combination would be declared void.

¹⁴⁷ 12 COLUMBIA LAW REVIEW, 97-133, 220-251.

The only object of the remedy conferred by Section 4 is to give the United States power to interfere in the case where the buyers or sellers were helpless at common law, and since the law in modern times seems to be only concerned with this indirect restraint on the freedom of buying or selling, the absence or presence of intent seems to be of small moment. If the freedom of trade is in fact restrained, it is small comfort to the parties whose trade is restrained to be told that the parties concerned did not intend to produce the restraint, and if their freedom is not so restrained, there does not seem to be any case with which the statute need concern itself under a liberal construction of its provisions. We have collected in the note a number of expressions as to the bearing of the question of intent in the cases arising under the act.¹⁴⁸

¹⁴⁸ "It is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it which determines whether it falls within the prohibition of the statute," Day, J., in *Chesapeake & Ohio Fuel Co. v. United States* (1902), 115 Fed. 610 at 623, 2 Fed. A. T. Dec. 151 at 167. "The statute outlines an offence but requires for its complete commission no ulterior motive such as to defraud," *per curiam*, *American Biscuit Co. v. Klotz* (1891), 44 Fed. 721 at 725, 1 Fed. A. T. Dec. 2 at 8. Holmes, J., in *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197 at 409, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338 at 530, says that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it. "The parties to it (the combination) are presumed to intend the inevitable consequences of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute," Sanborn, J., in *U. S. v. Standard Oil Co.* (1909) 173 Fed. 177 at 179, 3 Fed. A. T. Dec. 696 at 700. In a suit on a lease of a steamer, a covenant by the vendee not to enter into competition with the vendor was held void because of the dominant intent of the parties to control interstate commerce, *Darius Cole Transp. Co. v. White Star Line* (1911), 186 Fed. 63, 4 Fed. A. T. Dec. 36; with dissent that the intention of the parties was immaterial so long as the stipulations were reasonable. Where the acts complained of do not violate the act, intention and purpose to restrain competition are immaterial, *Whitwell v. Continental Tobacco Co.* (1903) 125 Fed. 454, 2 Fed. A. T. Dec. 271; see remarks of Sanborn, J., on p. 457, 275, as follows: "It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law." In *Anderson v. Shawnee Compress Co.* (1906) 87 Pac. Rep. 315 at 317, 3 Fed. A. T. Dec. 122 at 129, Pancoast, J., said: "It is immaterial in determining the legality of such contracts whether or not it was entered into with any evil intent, but the material consideration is its injurious tendency and the power thereby given to control prices," and then dwelt on at length on the apparent purpose of the contract to secure a monopoly as determining its illegality. When the question of intent is a question for the jury, see *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.* (1903) 126 Fed. 364 at 371, 372, 2 Fed. A. T. Dec.

288 at 298. In *U. S. v. Trans-Missouri Freight Assn.* (1897) 166 U. S. 290 at 341, 17 Super. Ct. Rep. 549, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 694, where the case was heard on bill and answer, Peckham, J., said that the intent alleged in the bill was not a necessary fact to be proved; that the question was one of law in regard to the meaning and effect of the agreement itself, namely, does the agreement restrain trade or commerce in any way so as to be a violation of the act? Holmes, J., in *Swift & Co. v. U. S.* (1905) 196 U. S. 375 at 396, 25 Sup. Ct. Rep. 276, 49 L. Ed. 518, 2 Fed. A. T. Dec. 641 at 663, said: "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts." In *Bigelow v. Calumet & Heckla Mining Co.* (1909) 167 Fed. 721, 3 Fed. A. T. Dec. 618, affirming 167 Fed. 704, 3 Fed. A. T. Dec. 593, which reversed 155 Fed. 869, 3 Fed. A. T. Dec. 293, one competing corporation acquired control of the capital stock of another, and the court held that some proof of unlawful intent to monopolize was necessary, as there was no provision in terms for a monopoly which was not brought about as a necessary legal consequence of the purchase. Fuller, C. J., in *U. S. v. E. C. Knight Co.* (1895) 156 U. S. 1 at 17, 15 Sup. Ct. Rep. 249, 39 L. Ed. 325, 1 Fed. A. T. Dec. 379 at 393, said that as there was no proof of any intent to restrain interstate commerce, the fact that interstate commerce might be indirectly affected was not enough to entitle the complainant to a decree. Lacombe, J., in *Lawlor, et al., v. Lowe, et al.* (1911), 187 Fed. 522 at 524, 4 Fed. A. T. Dec. 264 at 266, in an action under §7, said, where an unlawful combination has been shown to have brought about an injury to a person's business, recovery may be had though the impelling motive of the combination was an effort to better the interest of the combiners, which, except for the Anti-Trust Act might be proper and lawful. The question of intent referred to in this case was intent to do the acts charged and the necessary consequences thereof, irrespective of whether there was or was not an intent to restrain trade. In *Tonolipio Lorn v. Bradley* (1909), 171 Fed. 951, where a license agreement of the Victor Talking Machine Company, was held valid, although restricting prices; Chatfield, J., said: "A certain intent and certain motives which need not be discussed at length must be present to establish the interference with competition and the existence of the monopoly at which the statute was aimed." In *Camors and McConnell Co. v. McConnell*, 140 Fed. 412, 2 Fed. A. T. Dec. 813, 140 Fed. 987, 2 Fed. A. T. Dec. 825, in a proceeding by a covenantee to enforce a covenant in restraint of trade, the court said that those cases where an otherwise valid contract was deemed unlawful because of the intent of the covenantee to monopolize, were cases of direct proceedings against monopolies. In *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., et al.* (1895), 66 Fed. 637, 1 Fed. A. T. Dec. 421, affirming 55 Fed. 851, 1 Fed. A. T. Dec. 178, a demurrer to complain was sustained, although there was an allegation of purpose of establishing a monopoly. In *Citizens Wholesale Supply Co. v. Snyder*, 201 Fed. 907 (1912), action was brought against a number of citizens for combining to sustain the validity of an ordinance to prevent peddling, which ordinance was declared unconstitutional by the Supreme Court of the United States in 203 U. S. 507. The court said that the citizens had acted in good faith and were therefore not liable.

In *Standard Oil Co. v. United States*,¹⁴⁹ the court dwelt very strongly on the various steps in the defendant combination as showing an intent to monopolize. Indeed, this presumption of an intention to monopolize seems to have probably influenced the court to reach the conclusion that the defendant company was an unlawful combination. So, also, in *United States v. American Tobacco Co.*,¹⁵⁰ the court was strongly influenced by the same presence of intent to monopolize. Indeed, in these two recent cases the materiality of unlawful intent, that is, intent to monopolize, has been made more prominent than in any of the earlier cases.

It seems from these cases cited that the courts lay great stress on the presence or absence of intent. It is submitted, however, that intent is entirely immaterial, at least in civil cases, unless there is a very close question on the fact whether there is or is not a control of the market achieved, and, in such a case, intent to achieve that control may be referred to as buttressing the conclusion that the control has been actually achieved.

It will now be well to refer to some of the leading cases where the decision has turned on the question of fact whether there was an unlawful restraint on trade by a combination, that is whether the combination acquired a control of the market.

In *United States v. E. C. Knight Co.*,¹⁵¹ it appeared that ¹⁵² the American Sugar Ref. Company, which we shall refer to as the Company, a New Jersey corporation, had, prior to 1892, obtained control of all the refineries in the United States except four in Philadelphia and one in Boston, at which time the Philadelphia refineries produced 33 per cent., and the Boston refineries 2 per cent. of the sugar refined in the United States, and active competition existed between these refineries and the

¹⁴⁹ (1911) 221 U. S. 1, 31 Sup. Ct. Rep. 502, 55 L. Ed. 619, 4 Fed. A. T. Dec. 79.

¹⁵⁰ (1911) 221 U. S. 106, 31 Sup. Ct. Rep. 632, 55 L. Ed. 663, 4 Fed. A. T. Dec. 168.

¹⁵¹ (1895) 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. Ed. 325, 1 Fed. A. T. Dec. 379, 60 Fed. 306, 1 Fed. A. T. Dec. 250, 60 Fed. 934, 1 Fed. A. T. Dec. 258.

¹⁵² See findings of fact by Butler, J., in the court below, 60 Fed. 306 at 307, 1 Fed. A. T. Dec. 250 at 252, which were approved by the Supreme Court.

Company. In 1892, the Company bought the stock of the four Philadelphia concerns from the various stockholders by individual purchasers, and paid therefor by stock of the Company, the capital of which was increased for the purpose. The object of the Company in making the purchase was to obtain a greater influence or more perfect control over the business of refining and selling sugar in the United States. The stockholders in each of the Philadelphia companies acted in unison but in ignorance of the like action by the stockholders of the other companies, and in each case the entire corporation and its assets were turned over to the Company. After these purchases, the Company controlled 90 per cent. of the business of sugar refining in the United States, and the stockholders of the other companies were left free to establish other refineries or to continue the business as they saw fit. The United States filed a bill against the Company and the four Philadelphia companies, setting out that the transaction was in violation of the Act of 1890. The relief sought ¹⁵³ was cancellation of the agreements under which the stock was transferred, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violation of the act. It therefore appeared that in this case the government caught the combination, as it were, in the very beginning. The bill was dismissed, the case going off on the point that the transaction in question did not amount to interstate commerce, and although the conclusion of the court on this point has probably little support in reason, we shall offer no criticism, as that subject lies outside the limits of this article. The case, therefore, does not involve anything really of value for our purpose except the remarks of Harlan, J., in the dissenting opinion that the transaction in question amounting, as he concluded, to interstate commerce, was unlawful under the Anti-Trust Act. The combination in this case was caught, in the act of eliminating a competitor, and the court failed to see the effect of that on interstate buying and selling. The case may probably be considered as overruled on the question of

¹⁵³ As stated by Fuller, C. J., on p. 9.

interstate commerce, and if it came before the court today, would probably be decided the other way.

In *Addyston Pipe & Steel Co. v. United States*,¹⁵⁴ there was an agreement among certain manufacturers of cast iron pipe, by which competitive bidding on public contracts within certain specified territory was abolished, and the price to be paid was fixed by the officers of the association, and the work then given out among the members. The agreement was entered into for the purpose of preventing ruinous competition and raising the price of the product to a reasonable basis but not beyond. The result of the agreement was that the members of the association obtained an actual monopoly of the business in large districts, but as there were other mills in different parts of the United States, were compelled to keep the price below the limit which would involve competition from such competitors. This amount varied according to the geographical distance of the place where the iron was to be supplied from to competing mills and the mills of the combination, the rate of freight to be paid on cast iron being a material factor in fixing the price. The manufacturers entering into the agreement apparently manufactured about one-half of the output of the country,¹⁵⁵ and had the advantage over the other manufacturers in freight rates in selling within the specified territory. Although it was contended that the prices fixed by the association were reasonable, it appeared that they were considerably above the price at which pipe could be manufactured and sold at a fair profit. The defendant also sold their product at distant points at less price than they did at home. The combination was held illegal and an injunction issued accordingly on bill filed by the United States. This was a case, therefore, where some of the sellers combined among themselves against the other sellers, and, by reason of the circumstances of the case and the geographical location of their mills,

¹⁵⁴ (1899) 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. Ed. 136, 1 Fed. A. T. Dec. 1009, modifying and affirming 85 Fed. 271, 1 Fed. A. T. Dec. 772, which reversed 78 Fed. 712, 1 Fed. A. T. Dec. 631.

¹⁵⁵ See pp. 223-224, where it is stated that the manufacturers' tonnage was 220,000 tons. Other mills in the prescribed territory had an annual tonnage of 170,500 tons, and those in the free territory 348,000 tons.

were able to make the combination effective within a certain territory and under it could effect a certain enhancement of price, which, however, could not be carried beyond a certain point owing to the competition of the rest of the sellers. The combination, so far as it was effective and within the designated territory, achieved a control of the market.

In *United States v. E. I. duPont-de Nemours Co., et al.*,¹⁵⁶ a number of dealers in powder and explosives formed a trade association under which they conducted business for a number of years, and some of them incorporated and proceeded to eliminate competition by buying up corporate competitors and dissolving them. It appeared that the active agents made what the court characterized as "enormous profits," and did, in one line, 100 per cent. of the business of the country, and, in other lines, from 64 per cent. to 73 per cent. The combination was held void under the act in proceedings by the United States and injunction issued accordingly because the evidence showed that the combination for years persisted in the attempt to control the powder business which attempt resulted in complete success.

In *Standard Oil Co. v. United States*,¹⁵⁷ a bill was filed by the United States under Section 4 against the Standard Oil Company and a number of subsidiary companies and several individuals alleging an unlawful combination in restraint of trade in petroleum throughout the United States. A decree for the United States was affirmed, with slight modifications on appeal. It appeared that the Standard Oil Company was a holding company which had acquired stock control of a large number of corporations engaged in various branches of the oil business, and the question was whether this control of the oil business was sufficient to make a combination void under the act. The court held that it was illegal, laying great stress on the circumstance that the facts in the case showed a guilty intent to monopolize and exclude others from the business and bring about an unlawful restraint on trade, and further, that the Standard Oil Com-

¹⁵⁶ (1911) 188 Fed. 127, 4 Fed. A. T. Dec. 339.

¹⁵⁷ (1911) 221 U. S. 1, 31 Sup. Ct. Rep. 502, 55 L. Ed. 619, 4 Fed. A. T. Dec. 79, affirming and modifying 173 Fed. 177, 3 Fed. A. T. Dec. 696; 152 Fed. 290, 3 Fed. A. T. Dec. 173.

pany had such a dominant and complete control of the selling and buying as to destroy what the court below called the potentiality of competition. As the language of the learned judge who wrote the opinion in this case is most obscure and at points almost unintelligible, it is difficult to form a clear idea of the exact grounds of decision. A decree was entered directing the holding company to divest itself of the holdings in the subsidiary companies.¹⁵⁸

In *United States v. American Tobacco Co.*,¹⁵⁹ the proceeding was by the United States under Section 4 against a number of corporations and individuals charging that they were a combination in restraint of trade in tobacco and the products of tobacco, which was void under the Act of 1890.¹⁶⁰ The court held that the combination was void because a state of competition in the tobacco trade was gradually terminated by the growth and power of the defendant combination which bought out competitors, closed their plants, took covenants in restraint of trade, all of which clearly demonstrated a conscious intention to violate the act. The court characterized the control of the defendant combination as a vast power over the buying and selling of tobacco. By "vast" is perhaps meant a degree of control which is undue and therefore violates the act. The case was remanded to the court below to supervise the dissolution of the combination, the Supreme Court being of opinion that owing to the intricacies of the intercorporate holdings and the fact that the principal defendant, the American Tobacco Company, was not only a holding company but also a proprietary company, it would not be practicable to immediately frame and enter a proper decree of dissolution.

¹⁵⁸ The court said that the circumstance that the defendant company controlled a very small percentage of the crude oil products was immaterial because the absolute control over the refined product which had been achieved inevitably brought about a substantial control over the crude product; that is, the Standard Oil Co. obtained control of the selling of almost the entire market in refined oil, and therefore being the only seller was really the only buyer of the crude oil and able to control the price therefor. This shows that it is totally unnecessary for a combination to actually control the source of supply of a natural product when the purchase price can be controlled.

¹⁵⁹ (1911) 221 U. S. 106, 31 Sup. Ct. Rep. 632, 55 L. Ed. 663, affirming and modifying 164 Fed. 700, 3 Fed. A. T. Dec. 427.

¹⁶⁰ It appeared in this case that the combination bought a raw product and sold it again after manufacture; that it controlled both the buying and selling and therefore restrained trade both ways.

In order to avoid prolonging the discussion to an undue length, we have only referred to the principal cases involving the validity under the act of combinations relating to ordinary business. It is apprehended, however, that sufficient authority has been cited to demonstrate that the real question involved is whether the combination has acquired such control of the market that it is in a position to dictate the terms of the buying and selling. In many of these cases the court has referred to and obviously been influenced by methods used in achieving the control, as taking covenants not to trade, buying out of competitors, methods of unfair competition, *etc.* It seems, however, as if these considerations are, after all, immaterial if we are right in the conclusion that the real evil aimed at by the law is the control of the market. If that control is acquired, it makes no difference how it is done. The control must be destroyed. If the control is not accomplished there is nothing for the law to complain of.

We have concluded that covenants in restraint of trade are only unlawful under a liberal construction of the act when the combination covenantee acquires control of the market. Why should the law be different when we approach the subject from the point of view of the combination and consider the covenants as the means of achieving that control? In other words, if instead of considering the enforceability of the covenant as between the parties, we consider the state of facts brought about by the making of the covenant, and the state of facts which we are seeking to do away with is the same state of facts which if it exists makes the covenant unlawful, then it seems as if there should be no distinction between such covenants whether we consider their enforceability between the parties or whether we consider the interference with the buying and selling which is brought about by the performance of the covenant. There does not seem to be anything unlawful about unfair competition except as respects the party competed against. Those whose buying and selling is attempted to be restrained are not harmed unless that restraint is actually accomplished.

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